In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 61

PUROLATOR PRODUCTS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

In its brief in opposition, the Commission opposed petitioner's motion to amend the petition for certiorari to include the additional question whether the Commission's decision was invalid because less than a majority of the full Commission concurred therein (n. 9, p. 22). (Only three Commissioners participated in the decision, and the panel divided two-to-one.) The Commission pointed out (*id.* p. 23) that petitioner relied primarily on the conflict between

Flotill Products, Inc. v. *Federal Trade Commission*, 358 F. 2d 224 (holding that a decision concurred in by only two of the three participating Commissioners was invalid) and *Atlantic Refining Company* v. *Federal Trade Commission*, 344 F. 2d 599, 607 (C.A. 6), certiorari denied, 382 U.S. 939 (reaching a contrary conclusion); and that the Ninth Circuit had granted the Commission's petition for rehearing *en banc* in the *Flotill* case.

On August 15 the Ninth Circuit, in a five-to-four decision, adhered to its prior ruling in *Flotill*. A copy of the court's order is attached. Thus, there is now a direct conflict between the Sixth and Ninth Circuits.

The Solicitor General has decided to file a petition for a writ of certiorari in *Flotill*, and expects to do so shortly.

Since the question whether the Commission's order was invalid because a majority of its members had not concurred therein may involve the jurisdiction of the Commission, it would appear appropriate for the Court to consider the issue even though the petitioner did not raise the point in the court of appeals. In the circumstances, and in view of the direct conflict between the circuits and the fact that the Commission will file a petition in *Flotill*, the government does not oppose the motion to amend the petition. The Commission continues to oppose the petition on its merits for the reasons given in its brief in opposition; and the United States believes that the petition should be granted, to the extent and for the reasons set forth in its memorandum *amicus curiae*.

If the Court grants the petition on the substantive issues, it should also grant review on the jurisdictional question. If it decides to deny review on the substantive issues, however, it would seem appropriate to defer action on the jurisdictional question pending determination of the petition to be filed in *Flotill.*

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JAMES MCI. HENDERSON,
General Counsel,
Federal Trade Commission.

SEPTEMBER 1966.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,521

Filed Aug. 15, 1966, Wm. B. Luck, Clerk

FLOTILL PRODUCTS, INC., ET AL., PETITIONERS,

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review and Set Aside an Order of the Federal Trade Commission

Before: CHAMBERS, BARNES, HAMLEY, JERTBERG, MERRILL, KOELSCH, BROWNING, DUNIWAY and ELY, Circuit Judges.

ORDER

Per curiam:

The court en banc takes the case solely for the purpose of deciding "When is a majority a majority?".

The opinion of Judge Barnes is amended as follows: To the second paragraph on page 229 of 358 F.2d, after 49 U.S.C. § 17(1), is added: "Federal Power Commission, 16 U.S.C. § 792." In the third paragraph on page 229, the last sentence thereof is stricken, and substituted therefor is the following: "On the other hand, it is difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation."

Judges Chambers, Jertberg, Koelsch and Duniway concur in the opinion of Judge Barnes as so modified.

Judges Merrill, Browning and Ely concur with Judge Hamley in his dissent.

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